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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, *et al.*,
Appellants,

vs.

THE STATE OF CONNECTICUT, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF NEW JERSEY

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Interest of *Amicus Curiae*

On July 14, 1970 the Clerk of the Court wrote to the Executive Director of the Council of State Governments, stating that this case and *Sanks* v. *Georgia* (No. 28, 1970 Term) had been held over for reargument during the October, 1970 Term, and that the Court had invited states

directly interested in the cases to participate. The Attorney General of New Jersey reviewed the matter and determined that the issues presented have such a significant potential impact upon the State of New Jersey that a separate statement in the form of an *amicus curiae* brief should be filed.

Preliminarily, we note that New Jersey does not ordinarily require indigent civil litigants to pay filing fees as a prerequisite to the institution of a civil action. The New Jersey Legislature by enactment of Chapter 348 of the Laws of 1951 authorized waiver by the court of statutory fees payable by indigent litigants (N.J.S.A. 22A:1-7; see also N.J.S.A. 22A:2-23) and the Supreme Court of New Jersey, in the exercise of its rule-making power, has implemented this statutory authorization by providing that

> "[i]n any case in which a person is represented by a legal aid society, or Office of Economic Opportunity legal services project, the Office of Public Defender, or counsel assigned in accordance with these rules, all filing fees shall be waived by the clerk without the necessity of a court order." N.J.R. 1:13-2.

It is plain, however, that the arguments advanced by the appellants have broad ramifications with respect to other costs of civil litigation besides filing fees. The appellants' complaint specifically refers to publication costs as an expense of litigation they are unable to pay and requests that the State effect all necessary service of process without payment of costs by the appellants (A. 9-10). The appellants' reply brief filed with this Court relies extensively upon a recent unreported decision by a judge of the Superior Court of New Jersey, Chancery

Division (*Suber* v. *Suber* (Docket no. M-2366-68) (appeal pending in Superior Court, Appellate Division, Docket No. A-376-69)), which involved the State's obligation to pay publication costs for an indigent (Appellants' reply brief, pp. 8, 17-18). That brief further states that if the appellants prevail,

> ". . . Connecticut may have to pay an undetermined but relatively small amount to effect service of process on behalf of Appellants." (Appellants' reply brief, p. 12).

Additionally, the sweeping right of access to the courts, without regard to financial or other legitimate interests of the state, which the appellants urge the Court to read into the Due Process and Equal Protection clauses of the Fourteenth Amendment, would seem to imply not only an obligation on the part of a state to waive any filing fees payable to the state but also an affirmative duty to pay for any other civil litigation expenses which might result in a denial of access to the courts. The direction in which the appellants' argument ultimately leads is indicated by the quote from Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 Valpariso U. L. Rev. 21, 25 (1967), which is set forth at p. 14 of the reply brief:

> "[M]erely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses and, in some jurisdictions, court stenographers. More important, the system must assure that an attorney is provided for the litigant."

In short, the ultimate thrust of appellants' arguments appears to be that a state has an obligation comparable to that established in the criminal area by such cases as *Griffin* v. *Illinois*, 351 U. S. 12 (1958) and *Douglas* v. *California*, 372 U. S. 353 (1963) to pay for the costs of civil litigation by indigent parties.

Some of the cases now on appeal in the New Jersey courts indicate the range of situations in which it may be contended that a state is compelled by the United States Constitution to pay for the costs of litigation between private parties. The issue in *Suber* v. *Suber*, *supra* and *Dugger* v. *Dugger* (appeal pending in Superior Court, Appellate Division, Docket No. A-1038-69) is whether the state is obliged by the Constitution to pay for the publication costs of an indigent plaintiff in a suit for divorce. The issue in *Stewart* v. *Stewart* (appeal pending in Supreme Court of New Jersey, Docket No. A-95-69) (argued February 17 and March 2, 1970) is whether the state has an obligation comparable to that established for criminal appeals by *Griffin* v. *Illinois*, *supra*, to pay for the cost of a transcript for use on appeal by an indigent civil litigant. *In re Adoption of a Child by Ann White* (appeal pending in Superior Court, Appellate Division, Docket No. A-1549-69) involves a contention that the state is required to waive adoption investigation and report fees where the party initiating the action for adoption is indigent. Many other litigation expenses which may confront an indigent civil litigant, such as investigatory expenses, discovery costs and deposits for security, also could be the subject of claims against the state to finance those costs. See Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo. L. J. 516 (1968).

It is not possible to estimate with any accuracy the full financial burden which would be imposed upon the

State of New Jersey if the "equal protection" doctrines made applicable to criminal proceedings by such cases as *Griffin* and *Douglas* were transferred wholesale to the field of civil litigation. But there can be no doubt that to require the State to finance litigation expenses related to pretrial investigation, discovery, transcripts and even legal counsel for all indigent civil litigants would require expenditures amounting to millions of dollars. The extent of such expenditures would be still greater if the State were required to finance the costs of appeals by indigent civil litigants. It is clear, therefore, that the State of New Jersey has a substantial interest in this appeal.

ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution does not require a state to finance any of the expenses of civil litigation incurred by indigent parties.

Preliminarily, we observe that the appellees have set forth the pertinent authorities relating to the appellants' constitutional claims and have ably presented the arguments which support an affirmance of the decision of the three-judge District Court. It would be unnecessarily repetitious for those arguments to be repeated here so this brief is limited to comments which supplement the material already presented by the State of Connecticut.

The appellants place primary reliance upon the Equal Protection Clause of the Fourteenth Amendment in arguing for the recognition of a constitutional duty on the part of the states to finance the expenses of civil litigation by indigents. This Court has long recognized, however, that a denial of equal protection of the law is not

established simply because a law affects some individuals differently from others. *E.g. Barbier* v. *Connolly*, 113 U. S. 27 (1885); *Tigner* v. *Texas*, 310 U. S. 141 (1940); *Kotch* v. *Board of River Pilot Commissioners*, 330 U. S. 552 (1947); *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Dandridge* v. *Williams*, 397 U. S. 471 (1970). Where a law on its face applies equally to all persons, as is true of provisions requiring the payment of litigation expenses, the burden of establishing a denial of equal protection is a particularly heavy one. See *Kotch* v. *Board of River Pilot Commissioners, supra*. Thus laws which on their face apply equally to all have been found to deny equal protection on the basis of wealth only in narrowly limited areas; viz., in criminal proceedings (*Douglas* v. *California, supra; Griffin* v. *Illinois, supra.*) and in the exercise of the franchise. *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966).

The extent of a state's power to grant or withhold relief from the consequences of poverty and to determine the manner in which funds devoted to this purpose shall be spent is well illustrated by this Court's decision last term in *Dandridge* v. *Williams, supra*, in which it sustained the constitutionality of the ceilings established by Maryland for welfare benefits. The effect of these ceilings was to deny any additional assistance with respect to the fifth or any succeeding child in a family. The regulation was challenged as denying equal protection to needy children in large families, by depriving them of the necessities of life made available to needy children of other families. The Court, however, was able to find a rational basis for the regulation ". . . in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." 397 U. S. at 486. It is clear, moreover,

the Court rejected any contention that a "compelling state interest" need be shown to justify the differences in treatment among welfare recipients resulting from a welfare system. Rather, it recognized that it was appropriate to judge the constitutionality of legislation designed to alleviate the plight of the poor by the same standards as other social welfare provisions such as child labor laws and laws limiting working hours:

> "For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' Williamson v. Lee Optical Co., 348 U. S. 483, 488, 99 L. Ed. 563, 572, 75 S. Ct. 461. That era long ago passed into history. Ferguson v. Skrupa, 372 U. S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028, 95 ALR 2d 1347.
>
> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 S. Ct. 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69-70, 57 L. Ed. 730, 734, 33 S. Ct. 441. 'A statutory discrimination will not be

> set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U. S. 420, 426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101. 397 U. S. at 484-485.

This Court's refusal in *Dandridge* to give the equal protection clause an overly expansive interpretation no doubt reflected in part an awareness that the selection of revenue raising measures and the allocation of funds for the various functions entrusted to government to perform are generally considered to be a uniquely legislative responsibility. See *Knowlton* v. *Moore*, 178 U. S. 41, 100 (1900). It is the legislature which must determine the kind of taxes by which government revenues are to be obtained and the rates at which these taxes are to be set. Likewise, it is the legislature which must determine whether to use government revenues to build new schools, highways or prisons; whether to build new highways or beautify existing ones; whether to furnish additional specialists to assist classroom teachers or hire more classroom teachers; and whether to hire more government employees or raise the salaries of existing employees. Assistance for the poor involves difficult legislative judgments of a comparable nature.[1] Some think that a maximum amount of available resources should be devoted to education. Others consider low cost public housing or public health to be the highest priority item. Yet others assign primary importance to improving the legal services available to the poor. The allocation of government resources among these competing demands is generally committed to the legislature for their determination; for it is the legislative branch of government—and only that branch—which has the power to raise revenues and which is accountable to the people through the electoral process for the manner in which government revenues are spent. It would thus be inconsistent with the

proper allocation of responsibilities between the legislative and judicial branches of government and destructive of our federal system to read into the Equal Protection clause of the Fourteenth Amendment an inflexible requirement that the states finance the cost of civil litigation for indigents. Rather, the matter should be left for the legislative branches of government at the national, state and local levels.

CONCLUSION

For the reasons set forth above and in the brief of the appellees, it is respectfully submitted that the Court should affirm the decision of the three-judge District Court which granted the appellees' motion to dismiss.

Respectfully submitted,

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